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# AN AF(FUR)MATIVE DEFENSE: USING INTELLECTUAL PROPERTY AS A DEFENSE TO EMPLOYMENT DISCRIMINATION IN MASCOT HIRING

Taylor Farr\*

## I. INTRODUCTION

*“Until a character becomes a personality, it cannot be believed. Without personality, the character may do funny or interesting things, but unless people are able to identify themselves with the character, its actions seem unreal. And without personality, a story cannot ring true to the audience.”*

*Walt Disney*<sup>1</sup>

Mascots<sup>2</sup> are different animals. They bring some of our favorite characters from screens, packages, and comic book pages to life. Moreover, mascots serve a particularly important role on university campuses, offering a point of communal continuity<sup>3</sup>

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1. NORMAN M. KLEIN, SEVEN MINUTES: THE LIFE AND DEATH OF THE AMERICAN ANIMATED CARTOON 48 (1993).

2. This Article will refer to mascots as costumed characters that exist in the real world. Generally, this term will be specifically referring to characters whose suits completely cover their human selves. The term will not refer to two-dimensional logos or animations, even of the same character. The term additionally does not refer to live animal mascots.

3. See Patrick Woodhead, *The Importance of Brand Consistency*, MEDIUM (July 16, 2018), [<https://perma.cc/WA6F-HKP7>] (“People[‘s] brains look for consistency, patterns,

amid inevitable organizational changes. Although university buildings, athletes, faculty, and staff will eventually change, a mascot remains an inter-generational reference point for fans and alumni.<sup>4</sup> Indeed, a mascot gives a representative persona to universities, enabling those universities to more intentionally interact with fans and the community.<sup>5</sup> But a mascot can only attain this significance by creating and perpetuating a unique personality. It must strive for a relatable authenticity that allows fans to see the mascot as more than simply a person in a suit but instead as a real, inimitable character. Stated succinctly, a mascot must create a new persona, the spirit of a university, by paying particularly close attention to its look, mannerisms, and personality across time.<sup>6</sup>

Traditionally, universities protect their creations from competition and alteration through intellectual property law.<sup>7</sup> Mascots, however, implicate a legal doctrine that falls outside the scope of most trademarks, copyrights, and patents—employment law. This is the first piece of literature to address the intersection of intellectual property and employment discrimination doctrine in the context of mascot hiring. It illuminates the competing interests of universities, which seek to maintain consistent, distinct mascots to obtain intellectual property protection but also

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regularity. Over time, a consistent brand will generate trust and retain customers.”); *see also* William Arruda, *Why Consistency Is the Key to Successful Branding*, FORBES (Dec. 13, 2016), [<https://perma.cc/B9QD-2ZCM>] (“Consistency is the key to successful branding.”).

4. *See* e-mail from Jimmy Sanchez, Dir. of Mktg., Univ. of Ark., to author (Mar. 14, 2019) (on file with author) (“When fans see our mascots, they are filled with not only school spirit[] but also fond memories of attending games as a child.”); *see also* e-mail from Jacob Schauf, Mascot Coach, Univ. of Minn., to author (Mar. 5, 2019) (on file with author) (“A character has been established over decades[,] and it connects people of all generations. They all experience the same cheeky and mischievous Gopher, [the Minnesota mascot,] and when they tell stories, whether [they are] young or old, everyone has had an experience with a similar character.”).

5. *See* Sanchez, *supra* note 4 (“Without mascots, a lot of our ideas on improving fan engagement[] would be just that. Ideas. They are the living and breathing embodiment of what we are trying to do from a marketing perspective by making meaningful connections with our fans at our venues.”).

6. This concept can be traced back to Will Durant who, in discussing the philosophy of Aristotle, wrote, “[w]e are what we repeatedly do. Excellence, then, is not an act but a habit.” WILL DURANT, *THE STORY OF PHILOSOPHY* 98 (2006).

7. *See* Traci Dreher Quigley, *Commercialization of the State University: Why the Intellectual Property Protection Restoration Act of 2003 Is Necessary*, 152 U. PA. L. REV. 2001, 2003-04 (2004); *see generally* Jacob H. Rooksby, *University™: Trademark Rights Accretion in Higher Education*, 27 HARV. J.L. & TECH. 349 (2014).

express a commitment to abide by employment discrimination law. Ultimately, this Article argues that, in most circumstances, a prospective employee's legal rights should be subordinate to a university's intellectual property rights in the protection of its mascot.

Consider, for example, the relationship between employment law and intellectual property rights at the University of Arkansas.<sup>8</sup> The University of Arkansas has five mascots: Big Red, Sue E., Pork Chop, Boss Hog, and Ribby.<sup>9</sup> Each character is a personification of a Razorback, a pig with soft, red fur. Sue E., for example, is a female Razorback with hair bows, a cheerleading uniform, and pom-poms. She manifests what would traditionally constitute a feminine personality, as demonstrated by Sue E.'s swaying hips and flirtatious demeanor towards younger male fans. Pork Chop, by contrast, is a gender-neutral Razorback that stands shorter than 5'1" and wears team jerseys. Pork Chop has a very child-like personality; it runs with its arms spread like airplane wings and pranks fans.

Every spring, the University holds tryouts for each of its characters. Students from across campus audition, hoping to be the "face" of the University for the next year. To illustrate, consider the following hypothetical. A sophomore student, Charlie, wants to tryout as either Sue E. or Pork Chop. Charlie, however, is a 6'5", 210-pound male whose build derives from his high-school football career. Before tryouts even begin, the University dismisses Charlie from the tryout process. The University says that Charlie cannot tryout for Sue E. because his build does not match Sue E.'s. The University explains that Charlie is also unable to tryout as Pork Chop because the height limit for the character is 5'1". Upset, Charlie considers filing suit for gender discrimination.

In this instance, the law should permit the University to discriminate in order to preserve its intellectual property rights

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8. The following hypothetical is based on real mascots at the University of Arkansas, but the actual scenario and the policies stated are fictitious for the sake of this Article. For a visual depiction of the referenced characters, see *Spirit Squads*, ARK. RAZORBACKS, [<https://perma.cc/8TFG-T4B2>] (last visited Nov. 19, 2019).

9. Through its extended use, the University has acquired common law trademark rights over these characters. See *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1022-23 (11th Cir. 1989) (stating that common law trademark rights are acquired and retained through actual and continuous use of a mark in commerce).

over its characters. While advocating for the subordination of employment rights is perhaps controversial, there are two critical factors that render mascot hiring distinct. First, a court's prohibition of selective mascot hiring would inhibit the University's efforts in maintaining a distinct, protectable mark. This factor is especially significant because mascotting only constitutes a student's temporary opportunity but the University's perpetually protectable right. Second, mascots make up a negligible percentage of the job market.<sup>10</sup> Thus, the University's limited ability to enforce strict hiring criteria in this context would not cause widespread organizational discrimination.

This Article will serve three general purposes. First, it will give the legal community insight into the world of mascots.<sup>11</sup> Second, it will provide a novel, yet legitimate, defense to selective mascot hiring criteria. Finally, this Article provides universities with tangible practices that legitimize the proposed defense and reinforce their intellectual property rights.

Part II of this Article will provide a brief background of the legal doctrines involved in potential mascot litigation, namely employment discrimination law and intellectual property law.<sup>12</sup> While it will focus primarily on the protections offered by trademark law, it is worth noting that mascots, as fictional characters, dwell in the trifecta of intellectual property right protection.<sup>13</sup> Part III will analyze a university's ability to protect its mascots and intellectual property under current employment discrimination law.<sup>14</sup> First, this Article will examine the hiring

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10. In my years as a mascot, as well as a coach, the mascot program never exceeded eleven athletes.

11. The legal scholarship regarding mascots has been minimal at best. As a point of recent controversy, a relatively significant amount of literature has focused on racially-charged mascots, although the material is not referring to costumed characters. See, e.g., André Douglas Pond Cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 MARQ. SPORTS L. REV. 309 (2008). Additionally, some literature has addressed mascots, tortious acts, and fans' assumption of the risk. See, e.g., Christian H. Brill & Howard W. Brill, *Baseball Mascots and the Law*, 65 U. KAN. L. REV. 105 (2016).

12. See *infra* Part II.

13. Universities can protect their characters through trademarks, copyrights, and patents. See Michael Todd Helfand, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623, 629 (1992); Kathryn M. Foley, *Protecting Fictional Characters: Defining the Elusive Trademark-Copyright Divide*, 41 CONN. L. REV. 921, 938-39 (2009); Mascot Suit, U.S. Patent No. D562,530 (filed Mar. 28, 2005).

14. See *infra* Part III.

criteria through the bona fide qualification defense to a disparate treatment claim. Next, it will examine the criteria through the business necessity defense in a disparate impact case. Part IV will advocate for a modified defense, as proposed by Professor Elizabeth Rowe in her article *Intellectual Property and Employee Selection*.<sup>15</sup> Finally, Part V will address additional criteria in which this defense might be applicable.<sup>16</sup>

## II. BACKGROUND

To understand the tensions between employment discrimination law and intellectual property law in the context of hiring mascots, it is important to first understand how the two doctrines work individually. First, this Section will provide a brief background on employment discrimination law and the framework for disparate treatment and disparate impact suits. Second, it will provide an overview of intellectual property law which includes general protections and policies in relation to mascots.

### A. Employment Discrimination

Title VII of the Civil Rights Act of 1964<sup>17</sup> serves as the vehicle through which an employee can file suit against an employer for discrimination that occurred before, during, or after employment. It explicitly prohibits employers from discriminating on the basis of “race, color, religion, sex, or national origin.”<sup>18</sup> Other statutes and regulations, at both the federal and state level, have since extended these prohibitions to other areas such as age,<sup>19</sup> pregnancy,<sup>20</sup> sexual orientation,<sup>21</sup>

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15. See *infra* Part IV.

16. See *infra* Part V.

17. 42 U.S.C. § 2000e-2 (1991).

18. *Id.*

19. See, e.g., 29 U.S.C. §§ 621-24 (1967).

20. See, e.g., 29 C.F.R. § 1604.10 (1979).

21. While sexual orientation is not explicitly protected through a federal statute, multiple states have extended their employment discrimination laws to cover the class. See, e.g., CAL. GOV'T CODE §§ 12920, 12921, 12926, 12940 (West 2017); COLO. REV. STAT. § 24-34-402 (2017); DEL. CODE ANN. tit. 19, § 711 (2016).

gender identity,<sup>22</sup> genetic information,<sup>23</sup> and disabilities.<sup>24</sup> Plaintiffs have attempted to extend this broad list to additionally include attributes such as height,<sup>25</sup> weight,<sup>26</sup> and appearance.<sup>27</sup> While courts have yet to grant these extensions without a disparate impact in one of the enumerated areas, scholars have argued that courts should take a more expansive approach.<sup>28</sup>

An employee or applicant can bring a Title VII suit<sup>29</sup> under one of two theories: disparate treatment<sup>30</sup> or disparate impact.<sup>31</sup> A disparate treatment claim involves explicit discriminatory employment practices and proof of discriminatory intent.<sup>32</sup> To succeed on a disparate treatment claim, the plaintiff must prove: (1) membership in a protected class; (2) qualification for the job; (3) an adverse employment action; and (4) a causal connection between the adverse action and protected classification.<sup>33</sup> Once the plaintiff proves her prima facie case, the burden shifts to the

22. Similar to sexual orientation, multiple states have expanded employment discrimination protections to gender identity. *See, e.g.*, CAL. GOV'T CODE §§ 12926, 12940, 12949 (West 2018); DEL. CODE ANN. tit. 19, § 711 (2016); N.M. STAT. ANN. § 28-1-7 (2019).

23. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat 881 (2008).

24. *See, e.g.*, 29 U.S.C. §§ 791, 793-94 (2015).

25. *See Fahn v. Cowlitz Cty.*, 610 P.2d 857, 858-59 (1980).

26. *See Dothard v. Rawlinson*, 433 U.S. 321, 323-34 (1977).

27. *See, e.g.*, Matt Pearce, *Trump Wanted to Fire Women Who Weren't Pretty Enough, Say Employees at His California Golf Club*, L.A. TIMES (Sept. 29, 2016), [<https://perma.cc/YR8B-AMTT>] (discussing a lawsuit filed for loss of meal breaks and wages but highlighting alleged appearance discrimination).

28. *See, e.g.*, Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264 (2012); *see also* Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997); Courtney N. Kubilis, Note, "Weighting" for Protection in Massachusetts: The Myth of Equal Opportunity in Employment, 42 SUFFOLK U. L. REV. 211 (2008); Isaac B. Rosenberg, *Height Discrimination in Employment*, 2009 UTAH L. REV. 907 (2009); Elizabeth M. Adamitis, Note, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000); Mila Gumin, Note, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769 (2012).

29. While an employee could bring an employment discrimination claim under a variety of federal and state laws, this Article will focus on the use of Title VII as the legal vehicle. Title VII is applicable to all public and most private institutions across the nation and allows for this Article to utilize a consistent framework as compared to 50 different state laws. *See* 42 U.S.C. § 2000e (1991).

30. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

31. *Griggs v. Power Duke Co.*, 401 U.S. 424, 430-32 (1971).

32. *McDonnell Douglas Corp.*, 411 U.S. at 802-04.

33. *See id.* at 802.

employer to present a “legitimate, nondiscriminatory reason” for the seemingly disparate treatment of the employee.<sup>34</sup> Upon the employer’s successful presentation of a legitimate reason, the burden shifts yet again to the plaintiff-employee.<sup>35</sup> The plaintiff then has the opportunity to show that the “legitimate, nondiscriminatory reason” was mere “pretext” to the adverse action.<sup>36</sup>

The second theory under which a plaintiff can file suit is disparate impact.<sup>37</sup> This claim includes employment acts that are neutral on their face but have discriminatory effects.<sup>38</sup> For example, an employer’s use of a facially unbiased test that disproportionately excludes African Americans from the position would potentially violate Title VII under the disparate impact theory.<sup>39</sup> To bring a successful claim, a plaintiff must first prove a *prima facie* case by pointing to a specific employment policy or practice of the employer that causes a disproportionate impact on a protected group of which the plaintiff is a member.<sup>40</sup> After proving a *prima facie* case, the employer has two options. First, he can present his own evidence to show that in fact his practices do not disproportionately affect the protected group.<sup>41</sup> Secondly, the employer can establish that the practice is “job related for the position in question and consistent with business necessity.”<sup>42</sup> If established, the plaintiff can still succeed by showing that “an alternative employment practice” with a lesser disparate impact exists that the employer “refuses to adopt.”<sup>43</sup>

The theory an employee chooses matters greatly because it controls the defenses available to the employer.<sup>44</sup> Under disparate treatment, employers can raise a *bona fide* occupational

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34. *Id.*

35. See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

36. *Id.*

37. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 644-45 (1989); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971).

38. *Griggs*, 401 U.S. at 432.

39. See generally *Griggs*, 401 U.S. 424 (holding that if “an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer’s lack of discriminatory intent”).

40. 42 U.S.C. § 2000e-2(c), (k)(1)(A) (1991).

41. 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

42. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

43. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

44. See Elizabeth A. Rowe, *Intellectual Property and Employee Selection*, 48 WAKE FOREST L. REV. 25, 41 (2013).



qualification (BFOQ) as a statutory affirmative defense.<sup>45</sup> To prove that the employment practice is justified under the defense, an employer must show that: (1) a relationship exists between the employee's membership in a protected class and the inability to perform the job duties;<sup>46</sup> and (2) the job qualification goes to the "essence" of the business operation.<sup>47</sup> This narrowly tailored defense has worked for some employers in limited circumstances. For example, the court in *Wilson v. Southwest Airlines Co.*, noted that gender was a BFOQ for a Playboy Bunny when the primary purpose was to "titillate and entice male customers."<sup>48</sup> However, in *Wilson*, the court refused to recognize gender as a BFOQ for Southwest Airlines, which used women's "sex appeal" to "attract male customers" in order to establish their "love airline" campaign.<sup>49</sup> The court ultimately found that the airline's primary function was "to transport passengers safely and quickly from one point to another," which is not sex-linked.<sup>50</sup>

Alternatively, if the employee pursues the theory of disparate impact, the employer still has a common law defense.<sup>51</sup> After the plaintiff proves her prima facie case of disparate impact, the employer can show that the employment practice is necessary to the business.<sup>52</sup> The business necessity defense is broader than the BFOQ defense as courts have not interpreted it to be narrowly tailored.<sup>53</sup> It allows for broader justifications for employment discrimination, like safety and cost, and can apply to all protected classes, including race.<sup>54</sup>

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45. *Id.* at 42.

46. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

47. *Id.* at 203.

48. *See Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (discussing *St. Cross v. Playboy Club*, Appeal No. 773, No. CFS 22618-70 (N.Y. State Human Rights App. B. 1971)).

49. *See id.* at 294-95, 304. The court even noted that the use of female-only flight attendants brought about much of Southwest Airline's success at the time. *Id.* at 295.

50. *Id.* at 302 & n.25.

51. *Rowe, supra* note 44, at 50 ("[T]he business necessity doctrine is not statutorily based.").

52. *Id.*

53. *Id.*

54. *Id.*

## B. Intellectual Property

Intellectual property protects the ideas and creations of individuals.<sup>55</sup> This area of the law allows creators to protect literary works,<sup>56</sup> drawings,<sup>57</sup> the look and feel of a business,<sup>58</sup> and even mascots.<sup>59</sup> These powerful rights come through either a filing with the United States Patent and Trademark Office (USPTO)<sup>60</sup> or through common law principles.<sup>61</sup> Within the area of trademarks, this usually requires that the creator or filer show that the creation is distinctive on its own or, if not, that it has obtained a “secondary meaning,”<sup>62</sup> which is to say that the public associates the creation with the source of the good or service.<sup>63</sup> Mascots, for example, have an identity, a persona, of their own but also represent universities,<sup>64</sup> companies,<sup>65</sup> and sports teams.<sup>66</sup> After proving that secondary meaning or inherent distinctiveness exists, the creator can then prevent others from infringing on his ideas, through court action if need be.<sup>67</sup> This allows the creator to maintain the integrity of his creation.<sup>68</sup>

The power to maintain the creative integrity of the initial creation imparts certain duties upon the creator, or primary owner. The owner has a responsibility to control the now

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55. See *Intellectual Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

56. 17 U.S.C. § 102(a)(1) (1990).

57. 17 U.S.C. § 102(a)(5).

58. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765-67 (1992).

59. See *Fleurimond v. N.Y. Univ.*, 876 F. Supp. 2d 190, 197 (E.D.N.Y. 2012); see also *Harrison/Erickson, Inc. v. Chi. Bulls Ltd. P’ship*, No. 91 Civ. 1585 (PKL), 1991 WL 51118, at \*4 (S.D.N.Y. Apr. 3, 1991); *Corp. of Gonzaga Univ. v. Pendleton Enters., LLC*, 55 F. Supp. 3d 1319, 1329-30 (E.D. Wash. 2014).

60. See, e.g., *Apply Online*, U.S. PAT. & TRADEMARK OFF., [https://perma.cc/C922-SU7D] (last visited Oct. 26, 2019).

61. See *Rowe*, *supra* note 44, at 56.

62. See *Two Pesos, Inc.*, 505 U.S. at 769.

63. *Id.* at 766 n.4 (“Secondary meaning is used generally to indicate that a mark or dress ‘has come through use to be uniquely associated with a specific source.’”) (citation omitted).

64. See *About Aubie*, AUBURN U., [https://perma.cc/HCL2-9M2E] (last visited Oct. 26, 2019).

65. See Claire Suddath, *Mickey Mouse*, TIME (Nov. 18, 2008), [https://perma.cc/97QT-WFST] (claiming that at one point Mickey Mouse “had a 98% awareness rate among children between ages 3-11 worldwide.”).

66. See *About Benny*, IWANTBENNY.COM, [https://perma.cc/MSQ8-2TER] (last visited Oct. 26, 2019).

67. See *Two Pesos, Inc.*, 505 U.S. at 769.

68. *Id.* at 775.

trademarked creation so that it retains its “distinctiveness.”<sup>69</sup> This duty extends to the trademark’s third-party users as well as the primary owner.<sup>70</sup> While the primary owner may “license” the trademark for others to use, it may lose its rights if the mark becomes too generic<sup>71</sup> or is poorly reproduced as to cause confusion.<sup>72</sup> Similarly, the primary owner has the duty to maintain the trademark’s original look, lest the mark become vague and abandoned.<sup>73</sup> While an intellectual property theory deemed the “tacking doctrine” may allow for some level of variation, it does not permit owners to materially alter the trademark and retain their rights without some subsequent filing.<sup>74</sup>

If the primary owner fails to control its own mark through consistent use of the distinct likeness, a court may find that the owner has abandoned the mark.<sup>75</sup> Third parties may then raise abandonment as a defense to infringement.<sup>76</sup> Thus, the owner’s failure to control the consistency of his creation can ultimately lead to a loss of all ownership rights.<sup>77</sup> He may then have no

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69. See THOMAS P. ARDEN, PROTECTION OF NONTRADITIONAL MARKS: TRADEMARK RIGHTS IN SOUNDS, SCENTS, COLOR & PRODUCT DESIGN IN THE U.S. 76 (2000).

70. See Radiance A. Walters, *Partial Forfeiture: The Best Compromise in Trademark Licensing Protocol*, 91 J. PAT. & TRADEMARK OFF. SOC’Y 126, 126 (2009).

71. See Timothy Greene, *Trademark Hybridity and Brand Protection*, 46 LOY. U. CHI. L.J. 75, 100-01 (2014) (“People commonly use ‘kleenex’ and ‘vaseline’ generically, and not simply to describe things like KLEENEX or VASELINE.”).

72. See *Movie Mania Metro, Inc. v. GZ DVD’s Inc.*, 857 N.W.2d 677, 683 (Mich. Ct. App. 2014) (“If the consuming public is unable to use the mark to distinguish a good as originating from a particular source, the mark does not function as a trademark and is thus not entitled to legal protection.”).

73. See ARDEN, *supra* note 69, at 76 (“Inconsistency in the use of a mark, however, can undermine a claim of long use sufficient to establish secondary meaning.”); Donald S. Chisum, *Trademark Acquisition, Registration and Maintenance: A Primer*, 19 AIPLA Q.J. 123, 184-85 (1991).

74. See 1 The Law of Advertising § 11.02(5)(b)(i) (2019). This doctrine is what allows a company, Pepsi for example, to update their logo yet continue its intellectual property interest in the older logo. The tacking doctrine is an “exceptionally narrow circumstance[]” that allows for a company to protect its updated mark whenever it is the “legal equivalent” of the previous mark and creates “the same, continuing commercial impression.” *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 910 (2015). Additionally, the new “mark should not materially differ from or alter the character of the [previous] mark.” *Id.* This requires a fact-intensive inquiry and should typically be reserved for juries. *Id.* at 911. For a visual example of the tacking doctrine see *Trademark Tacking Examples*, LEHRMACH (May 4, 2015), [<https://perma.cc/KZL3-ZDGM>].

75. Chisum, *supra* note 73.

76. See, e.g., *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 434 (E.D. Pa. 2009).

77. See Walters, *supra* note 70, at 126.

choice but to passively watch from the sidelines as his beloved creation is used in all sorts of mediums contrary to his original purpose.<sup>78</sup>

### III. MASCOTS AND INTELLECTUAL PROPERTY WITHIN THE EXISTING EMPLOYMENT DISCRIMINATION FRAMEWORK

Having outlined the general principles of employment discrimination law and intellectual law, this Part shifts to the compatibility of intellectual property rights in mascots with the current employment discrimination law framework. Section A will address how intellectual property law and the need for a mascot's continuity of character fit within the BFOQ defense. Section B will similarly address how these same factors fit within the business necessity defense. The outcome of both parts is an unworkable framework which does not adequately protect the need of universities to maintain consistent characters.

#### A. Mascots as a Bona Fide Occupational Qualification

Let us now return to our earlier hypothetical.<sup>79</sup> Charlie (the student) has now decided to sue the University for disparate treatment on the basis of sex. Recall that the coach only considered females for the job and immediately dismissed Charlie as a candidate. Assume Charlie establishes the prima facie case for an employment discrimination claim. The burden to prove a justifiable reason for discrimination now shifts to the University and coach. The University can still utilize Title VII's built-in statutory BFOQ defense.<sup>80</sup>

When analyzing a BFOQ defense, the courts apply a three-part test.<sup>81</sup> First, the need for discrimination must go directly to the essence of the business.<sup>82</sup> Second, all or substantially all of

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78. *Id.*

79. *Supra* Part I.

80. 42 U.S.C. § 2000e-2(e) (1991).

81. The courts use variations of this test and sometimes use only one or a combination of the three parts. See *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

82. See *id.* (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971)). This is a separate and more restrictive defense than the business necessity defense to disparate impact claims. *Id.*

the protected class must be unable to effectively perform the job duties.<sup>83</sup> Third, there can be no reasonable alternatives.<sup>84</sup> This Part analyzes the difficulty that owners of mascots have satisfying these tests. However, the perceived "authenticity" exception within a BFOQ defense may provide adequate protection for mascots.

***1. The Need for Discrimination Must Go Directly to the Essence of the Business***

An owner satisfies the first prong "when the essence of the business operation would be undermined by not hiring members of one sex exclusively."<sup>85</sup> Courts and companies tend to disagree when defining the "essence of the business," but courts ultimately determine the primary purpose of the business.<sup>86</sup> These lines, as one can imagine, are gray. The court in *Wilson* made their decision on this prong.<sup>87</sup> Southwest Airlines attempted to establish its male-discriminating practices as a BFOQ by pointing to its notable success in branding itself as a "love airline" with "an image of feminine spirit, fun[,] and sex appeal."<sup>88</sup> The court noted that while sex appeal could be a BFOQ for discriminating against men for a company like Playboy, whose primary purpose is to "titillate and entice male customers,"<sup>89</sup> sex appeal could not support a BFOQ when the primary purpose of the company, like Southwest, is "to transport passengers safely and quickly from

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83. See *id.* (quoting *Weeks v. S. Bell Tel. and Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

84. See *id.* at 334 (holding that there were no reasonable alternatives allowing the female officer to work within the penitentiary due to the "particularly inhospitable" environment).

85. See *id.* at 333 (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971)).

86. See *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (finding that an airline's primary function is "to transport passengers safely from one point to another").

87. See *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 293 (N.D. Tex. 1981) ("[T]he only issue to decide is whether Southwest has proved that being female is a BFOQ reasonably necessary to the normal operation of its particular business.").

88. See *id.* at 294.

89. See *id.* at 301 (noting that "female sexuality [is] reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers" (citing *St. Cross v. Playboy Club*, Appeal No. 773, No. CFS 22618-70 (N.Y. State Human Rights App. B. 1971))).

one point to another.”<sup>90</sup> Notably, the courts will circumvent the unique methods companies execute to distinguish their service from competitors, and even disregard the success of those methods, unless they are essential to providing the service.<sup>91</sup>

In the mascot context, the University will likely have a difficult time tying its mascot to its primary purpose because it is a multi-faceted institution with many goals. If the court looks at the University as a whole, it will likely determine that the primary purpose is to educate individuals and the community.<sup>92</sup> At this broad-stroke level, the BFOQ defense will quickly fail because mascots are not essential to this educational purpose. Even if the court isolated the primary purpose of the University to just the athletic program, there is little hope that it will consider a mascot’s position essential to the primary purpose because multiple universities and teams are successful without a costumed mascot.<sup>93</sup> Because the primary purpose test does not effectively contemplate singular pieces of a multi-faceted organization, it is likely that the University will lose its defense on the first prong.

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90. See *id.* at 302 (also noting that “[w]hile possession of female allure and sex appeal have been made qualifications for Southwest’s contact personnel by virtue of the ‘love’ campaign, the functions served by employee sexuality in Southwest’s operations are not dominant ones”); *Diaz*, 442 F.2d at 388 (finding that an airline’s primary function is “to transport passengers safely from one point to another.”).

91. See *Wilson*, 517 F. Supp. at 295 (rejecting Southwest’s argument that being female was a BFOQ while conceding that Southwest’s “youthful, feminine image” curated through their hiring process had given the company a “distinct advantage”).

92. See, e.g., *Our Mission*, U. ARK., [https://perma.cc/794J-29F9] (last visited Oct. 27, 2019) (“Providing access to a comprehensive and internationally competitive public education, and fostering student success across a wide spectrum of disciplines.”); see also *Vision and Mission*, AUBURN U., [https://perma.cc/GB9A-9A7M] (last visited Oct. 27, 2019) (“Auburn University is committed to excellence in teaching at both the undergraduate and the graduate level.”); *Mission, Vision, Values and Core Goals*, OHIO ST. U., [https://perma.cc/PJM8-X8UJ] (last visited Oct. 27, 2019) (“Educating students through a comprehensive array of distinguished academic programs[.]”).

93. See, e.g., *Meet Reveille IX*, TEX. A & M U., [https://perma.cc/T4TS-5W89] (last visited Oct. 27, 2019) (noting that Reveille IX is the only mascot at Texas A&M University); see also Scott Cacciola, *Yankees’ Long-Forgotten Mascot*, WALL ST. J. (Jun. 15, 2010), [https://perma.cc/FD6E-ARM5] (noting that the Yankees retired their mascot in 1981); Jon Becker, *A New Dubs Mascot Unveiled—but Not in Oakland*, MERCURY NEWS (Mar. 24, 2018), [https://perma.cc/BL26-6P37] (noting that the Golden State Warriors retired their mascot in 2008).

**2. All or Substantially All of the Protected Class Is Unable to Fulfill the Duties of the Job**

If the University can prove that its mascot is tied to its primary purpose, it is unlikely that the University will be able to satisfy the second prong. An owner satisfies the second prong when it can show that “all or substantially all” of the protected class would be unable to fulfill the duties of the specific job.<sup>94</sup> Courts have teased this out to some degree by separating a job description into “mechanical functions” and soft skills.<sup>95</sup> For instance, in *Wilson v. Southwest Airlines Co.*, Southwest failed to establish that only women could perform the position of flight attendant.<sup>96</sup> While it described the duties as “entertain[ing] the passengers and maintain[ing] an atmosphere of informality and ‘fun’ during flights,”<sup>97</sup> the court noted that mere customer preference was not strong enough to support the BFOQ defense.<sup>98</sup> Men could just as easily perform the tasks as the female flight attendants.<sup>99</sup>

In the context of mascots, the differentiation between mechanical and soft skills seems furry at best. There are very few skills that resemble traditional mechanical skills, such as physical fitness requirements. Most of the skills fall into the court’s definition of soft skills, such as “entertain[ing] the [fans] and maintain[ing] an atmosphere of informality and ‘fun’ during [games].”<sup>100</sup> The ability to emulate the characteristics and personality of the specific character falls somewhere in between

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94. See *Diaz*, 442 F.2d at 388 (quoting *Weeks v. S. Bell Tel. and Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

95. See *id.* (stating that at least some males can serve the “non-mechanical functions” more commonly found in females).

96. *Wilson*, 517 F. Supp. at 295; see also Rowe, *supra* note 44, at 44-45 (“The ‘stewardess’ had to be ‘a nurse in the sky, a surrogate wife for lonely business passengers, a fantasy sexpot (‘coffee, tea, or me’), and a fashion model’”) (quoting RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 149 (2008)).

97. *Wilson*, 517 F. Supp. at 295.

98. See *id.* at 303 (noting that only when “customer preference for one sex is so strong that the business would be undermined if employees of the opposite sex were hired” would this factor be supportive of a BFOQ defense).

99. See *id.* at 300 (“Southwest concedes...that males are able to perform safely and efficiently all the basic, mechanical functions required of flight attendants and ticket agents.”).

100. See *id.* at 295.

this dichotomy. Emulating personality is likely a soft skill, but the physical ability to mimic the character's mannerisms is more akin to a mechanical skill. Even so, there is no basis to say that men cannot mimic the feminine characteristics of Sue E.<sup>101</sup> Another amorphous skill is the employee's ability to fill the distinct body shape of the mascot. While this skill is more physical in nature, it does not reflect the typical notion of "mechanical." This "skill" may require hiring criteria, such as a height limit, which substantially limits the availability of employment to a specific gender.<sup>102</sup> While the University can attempt to fashion several traditional arguments, this part of the test is ill-structured to fit the novel context of mascots.

### 3. The Owner Has No Reasonable Alternatives

Even if the University satisfies the first two prongs, the final prong turns to whether the owner can utilize any reasonable alternatives to accomplish the mission with less discriminatory impact.<sup>103</sup> Many lower courts have required that "the employer demonstrate that no less-restrictive alternative is available that

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101. This type of skill seems, on its face, to conflict with the prohibition of gender stereotyping. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); 1 BARBARA T. LINDEMANN ET AL., *EMPLOYMENT DISCRIMINATION LAW* 11-9 (Julia Campins et al., eds., 5th ed., 2012) [hereinafter LINDEMANN 5TH]. Similar to the employer in *Price Waterhouse*, it would not be uncommon to tell the employee portraying Sue E. to walk, act, or interact in a more "feminine" manner. *Price Waterhouse*, 490 U.S. at 235. There are some factors, however, that distinguish the case of mascots from *Price Waterhouse*. For instance, Title VII prohibits employers from "insisting that [the employee] match[] the stereotype associated with their group," whereas universities would be insisting that the employee match the personality and persona of the specific character. *Id.* at 251. There are other female mascots who do not have the same demeanor as Sue E. Additionally, the employee must only portray these characteristics when mascotting, not through the rest of the job. Universities would not, and cannot under *Price Waterhouse*, discriminate against an employee because he or she does not generally conform to the associated stereotype when they are not mascotting.

102. For example, Disney requires that Mickey be within the height range of 4'8" to 5'2". See Don, *What's Inside the Suit—Rigorous Requirements of a Disney Costumed Character*, DISNEYFANATIC.COM, [https://perma.cc/LV4N-WYMD] (last visited Oct. 27, 2019). This would disproportionately affect men as the maximum height requirement is at the 0.651 percentile of the height chart. See *Height Percentile Calculator, by Age or Country*, TALL.LIFE, [https://perma.cc/LW3G-DC6D] (last visited Oct. 27, 2019).

103. See 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 405 (C. Geoffrey Weirich et al., eds., 4th ed., 2007) [hereinafter LINDEMANN 4TH].



would preclude the need for [the] discrimination.”<sup>104</sup> The courts typically invoke this analysis when the employment discrimination stems from customer privacy,<sup>105</sup> commonly in the context of hospitals and prisons.<sup>106</sup>

In the context of mascots, the prong poorly fits. There are no customer privacy interests at stake which conflict with the gender of the University’s mascot.<sup>107</sup> Even if the hypothetical court decided to expand the prong outside of privacy interests, there are arguably other ways the University might maintain the essence of the character without the absolute elimination of the same. For instance, adjustable padding in the suit could allow for various body shapes while maintaining a consistent, distinct outward appearance, which is needed for intellectual property protection.<sup>108</sup> This, however, might not accommodate certain attributes, such as height.<sup>109</sup> Another avenue the University could take to maintain its intellectual property while avoiding discrimination is to keep multiple trademarks of different “versions” of the character. However, this would tend to be burdensome because the University would have to continually use these “off” versions every so often to avoid abandonment of the trademark.<sup>110</sup> Regardless, the court would likely find that there

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104. LINDEMANN 5TH, *supra* note 101, at 10-15.

105. *See id.*; *see, e.g.*, *Reed v. Cty. of Casey*, 184 F.3d 597, 599-600 (6th Cir. 1999); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132-33 (3d Cir. 1996).

106. *See, e.g.*, *Healey*, 78 F.3d at 132 (addressing the tension between a patient’s privacy interests and the non-discriminatory interests of Title VII); *Gunther v. Iowa State Men’s Reformatory*, 612 F.2d 1079, 1086 (8th Cir. 1980) (addressing the tension between a prisoner’s privacy rights and the non-discriminatory objective of Title VII).

107. In line with continuity of character, many universities require the identity of mascots to be kept secret, but these are not the type of interests involved in the “reasonable alternative” analysis.

108. *See* e-mail from Kamille Ratzlaff, Mascot Coach, Univ. of Kan., to author (Feb. 26, 2019) (on file with author) (“Our suit is fairly accommodating to different body shapes as long as they fit within the height requirement. If someone is on the slimmer side of life, we can always add padding.”); *see also* e-mail from Michael Kussin, Mascot Coach, Univ. of Colo. Boulder, to author (Mar. 6, 2019) (on file with author) (“We have different sized jerseys that will fit different body shapes, however there is still an appearance that is necessary to have.”).

109. For example, stilts might be utilized to make an individual taller, but nothing can be done to make a tall individual shorter.

110. In order to maintain the trademarks under the Lanham Act, the University would have to use the various trademarks from time to time every three years. *See* 15 U.S.C. § 1127 (2006). This would force the University to hire individuals to specifically “fill” the special trademarks, which would force the University to discriminate yet again.

are alternatives that the University can take to avoid discriminatory hiring practices.

#### 4. *Authenticity and Mascots*

While all three parts may fail, there remains one thread of hope within the BFOQ context: authenticity.<sup>111</sup> Lower courts seemingly allow for narrow discrimination when the discrimination relates to the authenticity of the business.<sup>112</sup> This theory is rare, but it allows, for instance, directors to be seemingly discriminatory in movie or play castings.<sup>113</sup> It is also the theory Disney utilizes in order to hire only those that fit the various cultural profiles at EPCOT.<sup>114</sup>

The context is slightly different in relation to mascots, but it, nonetheless, should apply. As a trademarked creation, there is a specific way that the character is supposed to look. The reality is that when these characteristics (height, body shape, build, etc.) change, the character effectively changes.<sup>115</sup> Surely, one can remember when, as a kid, he would instantly notice any differences in his favorite costumed character. When differences are obvious, they kill the “magic” of the character.<sup>116</sup> It is not

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111. See Rowe, *supra* note 44, at 48-49.

112. See *Util. Workers v. S. Cal. Edison*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970) (“It could be said that in order to operate an authentically atmospheric Chinese restaurant, it is reasonably necessary to have the waiters and waitresses be Chinese.”).

113. See *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981).

114. For example, Disney is allowed to discriminate against those who do not appear to be of Norwegian descent in order to maintain an *authentic* feel when park guests visit the Norway portion of the park. See Rowe, *supra* note 44, at 48-49; see also *Gupta v. Walt Disney World Co.*, 256 F. App’x 279, 282 (11th Cir. 2007).

115. The University of Kansas regularly receives negative comments on their social media when they have to use substitutes for their mascots who are different heights than their typical characters. See Ratzlaff, *supra* note 108 (“[M]ost often the comments on [social media] are ‘This isn’t the real Baby, it’s too tall’...or something to that effect.”). Even though the University of Colorado can adjust their suit for height, they have recognized that there is a limit. See Kussin, *supra* note 108 (“Our suit is designed in a way that allows for performers of a wide range of heights, but we typically notice that around and below the 5’7” mark ends up looking too much like [our other, shorter character].”).

116. Ratzlaff, *supra* note 108 (“Our fan base knows exactly how these characters should act and when they are off, we will get feedback. Fans grew up watching the games and learning to love Big Jay and Baby Jay. It’s an amazing thing when adults bring their kiddos to the game and introduce the little ones to their ‘friend’ Big Jay and how they went to college together. Grandma and Grandpa have told the kids about when Baby Jay was hatched on the 50-yard-line during the Homecoming Game. These people have learned the

uncommon for a child to call a character by a different name because it looks *so* different from its intended image.<sup>117</sup> When this “continuity of character” erodes, so does the value of the character to the university.<sup>118</sup> These mascots take on lives of their own which personify the University and enable those mascots to interact with their fan base in a personal way. Therefore, there is a great need to maintain strict hiring criteria for mascot selection in order to preserve the authenticity of the character, as well as protect the rights surrounding it.

### B. Mascots as a Business Necessity

Returning to the hypothetical, Charlie could alternatively attack the height-based hiring practice as a whole, arguing that the seemingly neutral height-limit policy disproportionately impacts a Title VII enumerated protected class, gender, in a discriminatory fashion. Plaintiffs have raised this type of discrimination claim in multiple contexts, such as entrance exams,<sup>119</sup> height or weight requirements,<sup>120</sup> and physical fitness requirements.<sup>121</sup> Employers must show that “the challenged practice is job related for the position in question and consistent with business necessity.”<sup>122</sup> Employers can meet this standard seemingly easier than the BFOQ defense because, unlike the primary purpose analysis in the BFOQ framework, the necessity does not need to be “essential” or “indispensable.”<sup>123</sup> Courts have allowed for

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mascots’ personalities and stories from the literal beginning of when they were created. Who are we to change the personality of the faces that people have come to know and love?”).

117. E-mail from John Kilpatrick, Former Mascot, Univ. of Ark., to author (Jun. 12, 2019, 08:05 CDT) (on file with author) (“[A]t times[,] when playing a character known to be larger in size (Big Red), [] it’s pretty common for me to get mistaken...for one of the smaller characters, Pork Chop. Oftentimes, size plays a large role [in] the actual ‘look’ of a character.”).

118. “Continuity of character” is a phrase used in the industry which relates to the mascot remaining the same, both physically and characteristically, even though the employee changes.

119. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 563-64 (2009).

120. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 323-24 (1977).

121. *See, e.g., id.* at 324 n.2.

122. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1991); *see Lewis v. City of Chicago*, 560 U.S. 205, 212 (2010).

123. *See Rowe, supra* note 44, at 50; *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (“[T]his degree of scrutiny would be almost impossible for most employers to meet....”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-

broader employment considerations, such as safety, cost, and, potentially, intellectual property.<sup>124</sup> These types of considerations can help employers justify the discrimination in order to protect their business models and marketing tools.

This is surely a relief for universities which cannot say that the presence of their mascots is the primary purpose of the business even though they are still very integral to the overall experience.<sup>125</sup> Universities can use considerations such as the value of intellectual property rights of the character to justify its disparate hiring criteria.<sup>126</sup> While teams can be successful without mascots,<sup>127</sup> there is a lot of value tied to these characters.<sup>128</sup> These characters bring in significant financial revenue to their respective programs through both appearances and merchandise.<sup>129</sup> Additionally, these characters bring intrinsic, albeit intangible, value to the atmosphere and experience of their programs.<sup>130</sup> Fans can hardly imagine the

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166, 105 Stat. 1071, *as recognized in* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

124. *See* Rowe, *supra* note 44, at 50.

125. *See supra* notes 92-93 and accompanying text.

126. *See* Rowe, *supra* note 44, at 50. One consideration not as integral to this Article would be the safety of the fetus during pregnancy. The body can experience more intense temperatures and exertion while mascotting, which can negatively impact the health of the fetus. The Supreme Court was clear, though, in *UAW v. Johnson Controls* in stating that "fetal...safety was best left to the mother." *See* 499 U.S. 187, 202 (1991). Although discussing the BFOQ defense, the Court would likely find that while "[no] one can disregard the possibility of injury to future children; the [business necessity defense], however is not so broad that it transforms this deep social concern into an essential aspect of [mascotting]." *See id.* at 203-04.

127. *See supra* note 93 and accompanying text.

128. *See* Brooks Barnes, *Mickey Turns 90, and the Disney Marketing Machine Celebrates*, N.Y. TIMES (Nov. 3, 2018), [<https://perma.cc/JVP9-CYPE>] (noting that "Mickey and his friends...generat[e] annual retail sales of at least \$3.2 billion").

129. *See* Schauf, *supra* note 4 (stating that Goldy, the University of Minnesota mascot, annually grosses between \$70,000.00 and \$90,000.00, which does not include the promotions, advertisements, and sponsorships in which Goldy appears); *see also* Kussin, *supra* note 108 (noting that Chip, the University of Colorado mascot, makes 150-200 paid events a year charging \$250.00 each).

130. *See* Ratzlaff, *supra* note 108 ("Fans want to get as close to the action as possible and while they may not be able to be on the court with their favorite player, they can interact, take a picture and even celebrate with the mascot."); *see also* Kussin, *supra* note 108 (noting that Chip, the University of Colorado mascot, helps to create the home field advantage by starting "slow claps," leading the wave, and entertaining fans with "shenanigans"); Schauf, *supra* note 4 ("Goldy [the University of Minnesota mascot,] is able to add more of a personal touch. He is able to work the crowd and interact with almost everyone in attendance throughout the game. It allows [for] a more personal experience, creating lifelong memories

game experience being the same without their favorite characters. Further, a child's experience with a mascot may be the first step on his or her journey to attending that university.<sup>131</sup>

Courts should view the intellectual property rights themselves as a business necessity. The exclusivity of these characters, achieved through intellectual property protections, is in part what makes them so valuable to universities. To ensure that universities maintain their rights, they need to keep the character the same.<sup>132</sup> By forcing universities to repeatedly bend their timeless characters to the characteristics of one individual, courts could force universities' mascots into variants that cannot be protected by intellectual property law.<sup>133</sup> Therefore, the strict hiring criteria is a job-related business necessity required to maintain the distinct shape of these characters and protect them from outside competition. Although mascots might fare better in this business necessity context, a successful defense under the traditional framework still appears awkward and forced.

#### IV. INTELLECTUAL PROPERTY AS AN INDEPENDENT DEFENSE TO EMPLOYMENT DISCRIMINATION

Because of the difficulties of forcing intellectual property defenses into existing employment discrimination law, Professor Elizabeth Rowe has developed a new framework to weigh these

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with the fans."); Sanchez, *supra* note 4 ("When fans see our mascots, they are filled with not only school spirit, but also fond memories of attending games as a child. When our fans see our mascots outside our event venues, it shows them our willingness to come to them and support their initiatives in the community, just like they come out and support our student-athletes.").

131. See e-mail from Adam Devault, Dir. of Mktg. Entm't, Nashville Predators, to author (Apr. 19, 2019) (on file with author) ("[A child's] love for the team often results in attending that school which turns into being an alumn[us or alumna] of that school. Alumni bring money to the school along with their children who often follow in the parents['] footsteps and fall in love with the mascot!"); see also e-mail from Corey Edwards, Aubie Mascot Program Advisor, Auburn Univ., to author (Apr. 3, 2019, 03:49 CST) (on file with author) (noting feedback that Auburn kids "watch some of Aubie's annual highlight videos every night before they go to bed"); Patrick Woodhead, *The Importance of Brand Consistency*, MEDIUM (July 16, 2018), [<https://perma.cc/MZ68-T59P>] ("[Consistency] may even turn customers into followers or brand advocates, if your identity is strong and consistent enough.").

132. See ARDEN, *supra* note 69, at 76.

133. See *id.*

competing interests.<sup>134</sup> Her framework is designed to address “branded service[s],” but the test easily meets the various needs of mascot employment.<sup>135</sup> The test is not necessarily meant to serve as a separate affirmative defense when intellectual property is present, but rather it is meant to serve as an alternative test under the BFOQ or business necessity defense.<sup>136</sup> Her framework seeks to strike a balance between the spirit of employment discrimination law and the need to accommodate more novel business models.<sup>137</sup>

The test requires the employer to prove four elements: (A) proof of the intellectual property;<sup>138</sup> (B) the relationship between the intellectual property and the business practice;<sup>139</sup> (C) the relationship to the intellectual property and the job description;<sup>140</sup> and (D) the relationship of the intellectual property to its business success.<sup>141</sup>

### A. Proof of Intellectual Property

In order for employers to satisfy this test, they must to show that they have some intellectual property right to protect: the character.<sup>142</sup> An owner can show these rights through registration with the USPTO or through common law principles.<sup>143</sup> Registration is a much more tangible and concrete way for an employer to prove this element.<sup>144</sup> To establish common law protections, an employer will need to show that they used the mark in relation to their business and that their consumers identify the mark with that business.<sup>145</sup>

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134. Rowe, *supra* note 44, at 53.

135. *Id.* at 26.

136. *Id.* at 54.

137. *Id.* at 56.

138. *Id.*

139. Rowe, *supra* note 44, at 58.

140. *Id.*

141. *Id.* at 59.

142. *Id.* at 56.

143. *Id.*

144. Employers can register their trademark in the federal system by filing online with the United States Patent and Trademark Office. See *Apply Online*, U.S. PAT. & TRADEMARK OFF., [<https://perma.cc/PQ82-3E4M>] (last visited Oct. 28, 2019).

145. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

In the context of mascots, many universities and companies have common law rights over their live-action characters.<sup>146</sup> This analysis should charge employers to do one of two things. At the very least, these employers should utilize their characters in such a way that the mascot becomes one with the business, ensuring that the mark satisfies the common law test.<sup>147</sup> A university can accomplish this by having the character appear at as many sporting, campus, and community events as possible so that the character and the university become synonymous. The better route for employers is to ensure that they have registered their characters through some type of intellectual property medium: trademark, patent, copyright, or all three.

### **B. Relationship of Intellectual Property to Business Practice**

The next element an employer will have to prove is the connection between the business practice and the intellectual property, i.e., the character.<sup>148</sup> This may develop very similarly to the business necessity test.<sup>149</sup> This analysis should be broader than the former test and much more than the primary purpose test within the BFOQ defense.<sup>150</sup> The employer must show that there is a legitimate business purpose for the intellectual property.<sup>151</sup> An employer can show this by the purpose and value of the intellectual property as well as the business model.<sup>152</sup> Alternatively, the employer could prove this using industry trends.<sup>153</sup>

In the context of mascots, a university may prove this element in a number of ways. First, it may show the marketing

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146. See, e.g., e-mail from Brian Hommel, LSU Trademark Licensing, La. State Univ., to author (Oct. 8, 2018) (on file with author) (noting that LSU has common law rights in its mascot, Mike the Tiger, based on its longstanding use).

147. For example, Aubie the Tiger's presence permeates into every facet of Auburn University, participating in thousands of events, starring in highlight videos, and even managing his own clothing line. See Edwards, *supra* note 131.

148. Rowe, *supra* note 44, at 58.

149. See *supra* Section III.B.

150. Professor Rowe notes that this element may help strike a balance between a business's self-serving interest and the court's complete discretion in defining the purpose of the business. Intellectual property rights would be an objective or qualitative way to determine a business's integral practice. See Rowe, *supra* note 44, at 58.

151. *Id.*

152. *Id.*

153. See *id.*

value of a mascot.<sup>154</sup> For example, mascots generate income for universities through appearances, sponsorship amenities, and licensed merchandise.<sup>155</sup> Marketing value can also manifest in more unquantifiable means, such as community-university relations and rapport with the fan base.<sup>156</sup> A university may also use industry trends. While some universities do not have costumed mascots, a quick overview shows that many do.<sup>157</sup> Finally, the closer to a university's purpose a mascot is, the easier it will be for it to prove this element. Companies like Disney, for example, will have a more successful case where their characters are at the heart of their business, compared to universities where the mascot can be a minor part of an overall marketing plan.<sup>158</sup> This element further persuades employers to utilize their mascots and tie them to their central purpose and scheme.

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154. See Sanchez, *supra* note 4 (“[Our mascots] help us accomplish various fan engagement initiatives in our venues including: meeting and greeting our fans throughout the event space, encouraging active participation throughout the event, and aiding in various marketing initiatives. By utilizing mascots in our strategic plans, we are able to cultivate relationships with fans, both young and old, with a constant that helps deliver unforgettable experiences through entertainment, relationships[,] and overall fun.”).

155. See, e.g., Schauf, *supra* note 4. The marketing value is only one way for employers to prove the business practice element. It is centrally tied to the business success element of Professor Rowe's framework and, therefore, is discussed in more detail in Section IV.D, *infra*.

156. The specifics of these unquantifiable metrics are discussed in greater detail in the context of the business success element. See *infra* Section IV.D.

157. See, e.g., *Spirit Squads*, U. ARK., [https://perma.cc/K3W7-BKXJ] (last visited Oct. 23, 2019) (Big Red, Boss Hog, Ribby, Pork Chop, and Sue E.); *Spirit Squads: History of Big Al*, U. ALA., [perma.cc/88D3-CZUG] (last visited Oct. 23, 2019); *About Aubie*, AUBURN U., [perma.cc/X4Z5-FKPF] (last visited Oct. 23, 2019); *Albert & Alberta*, U. FLA., [perma.cc/F3XT-6SPA] (last visited Oct. 23, 2019); *Spirit Squad: Hairy Dawg*, U. GA., [perma.cc/9R3Z-LHPX] (last visited Oct. 23, 2019); *Mascots*, U. KY., [perma.cc/6425-FGHU] (last visited Oct. 23, 2019) (Wildcat and Scratch); *LSU Mascot & Auditions*, LA. ST. U., [perma.cc/CQD2-F7D5] (last visited Oct. 23, 2019) (Mike the Tiger); *Bully*, MISS. ST. U., [perma.cc/WR4Y-5DAG] (last visited Oct. 23, 2019); *Welcome Tony*, U. MISS., [perma.cc/H3C6-V75K] (last visited Oct. 23, 2019); *2015-2016 General Roster: Truman the Tiger*, U. MO., [perma.cc/A9HL-PEDV] (last visited Oct. 23, 2019) (Truman the Tiger); *History and Biography of Cocky*, U. S.C., [perma.cc/M2FD-2VY3] (last visited Oct. 23, 2019); *Cheer, Dance & Mascots: Mascots*, U. TENN., [perma.cc/RGJ4-U3RB] (last visited Oct. 23, 2019) (Smoke, Junior Smoke, and Davy Crockett); *Vanderbilt Spirit Programs: Mr. Commodore*, VAND. U., [perma.cc/83PG-FHJJ] (last visited Oct. 23, 2019).

158. For example, Aubie the Tiger at Auburn University participates in events on and off the field and “has become a very advantageous image for Auburn marketing across the board.” Edwards, *supra* note 131.



### C. Relationship of Intellectual Property to the Job Description

The next element will ask the court to analyze the relationship of the intellectual property to the job description.<sup>159</sup> Essentially, this element requires the employer to defend why the intellectual property is an important qualification of the job.<sup>160</sup> Professor Rowe points out that courts typically give great deference to employers under the business judgment rule to define these job descriptions.<sup>161</sup> If the employer can then prove this, it weakens the plaintiff's claim that he or she was indeed qualified.<sup>162</sup>

In the context of mascots, employers would likely rely on the authenticity rationale. In order to have an authentic, life-like character, that character must remain the same.<sup>163</sup> While the employer or coach can arguably teach the employee the correct personality and mannerisms, more physical criteria are difficult or impossible to adjust, such as making a person shorter or their shoulders narrower.<sup>164</sup> If a court allows for these qualifications to lose their gravity, the character would inherently change and ultimately lose intellectual property protection. The job description for mascots helps avoid losing intellectual property protection by maintaining the consistency of the mascot's appearance. If an employer is going to reap the benefits of having their character brought to life as a mascot, they will have to keep the character consistent or else lose their rights all together.<sup>165</sup>

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159. Rowe, *supra* note 44, at 58. Universities, especially those with multiple characters, can argue that the job is "mascot" rather than the specific character, like "Sue E." For the purposes of this Section, this Article will treat the job description as character specific as that would be the most strictly construed definition.

160. *Id.*

161. *Id.* at 58-59.

162. Professor Rowe notes that this element is extremely important as it attacks the heart of a plaintiff's prima facie case that they were qualified. *See id.* at 58.

163. *See* Ratzlaff, *supra* note 108 (noting that fans comment, "This isn't the real Baby [Jay], it's too tall" when the character is disproportional).

164. While a person's weight can greatly fluctuate, their body structure is relatively static. Any changes would have to be made through very specific workout to re-shape the musculature of the body, which would take long periods of time. Finally, some traits like height are never going to change. These traits can sometimes be compensated for with modifications to the suit, however, many times they cannot.

165. *See* Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402, 434 (E.D. Penn. 2009).

This element also challenges employers to be more stringent on their hiring requirements. This provides some benefit to the employee as intellectual property creates more defined hiring criteria. Without this prong, employers could arbitrarily use qualifications to discriminate against employees.<sup>166</sup> This element arguably keeps employers honest as they have a very specific standard for which they have to hire.<sup>167</sup>

#### **D. Relationship between Intellectual Property and Business Success**

The last element addresses the economic profitability of the intellectual property.<sup>168</sup> The economic profitability is why these assets are so vigorously protected by the law. Without this demonstration, a company could arbitrarily create intellectual property guidelines that allow it to discriminate against certain individuals.<sup>169</sup> The traditional metric for value is money, but this will not work in all instances.

In the context of mascots, the traditional monetary metric will prove problematic for universities that will have to somehow quantify their character's value in order to succeed on this defense. As a marketing tool, mascots do not necessarily generate an independent revenue line for their respective companies.<sup>170</sup> Many times, companies use characters to increase customer or fan relations.<sup>171</sup> For example, Aubie the Tiger at Auburn University makes about 1,000 community appearances a year for free.<sup>172</sup> This obviously has an intrinsic value. To show the value that the

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166. See Rowe, *supra* note 44, at 55.

167. *Id.* at 56-57.

168. *Id.* at 59.

169. *Id.* ("Because of the important antidiscrimination policies at stake, however, it is desirable that the mere presence of IP does not necessarily make the defense successful. Rather, the IP ought to be at the core of the company's economic success.")

170. Sanchez, *supra* note 4 ("[W]e don't have current metrics detailing the revenue generation that our 'Ribby' mascot [and] logo has created[.]").

171. See *id.* ("They help us accomplish various fan engagement initiatives in our venues including: meeting and greeting our fans throughout the event space, encouraging active participation throughout the event, and aiding in various marketing initiatives. By utilizing mascots in our strategic plans, we are able to cultivate relationships with fans, both young and old, with a constant that helps deliver unforgettable experiences through entertainment, relationships[,] and overall fun.")

172. See Edwards, *supra* note 131.

character adds to its organization, Auburn University would have to create with some metric, potentially social media analytics.<sup>173</sup>

Recently established universities and their characters could have significant difficulties demonstrating the relationship between their intellectual property and the success of the organization.<sup>174</sup> Money will not suffice as a metric as the university may not be established yet, much less the character. While the future potential profit might serve as a metric, this will likely be arbitrary and uncertain. The intellectual property rights in themselves, however, might serve as the business success element.<sup>175</sup> If a university is not able to maintain strict hiring criteria based on body shape due to employment discrimination law, it may never be able to register its character to protect the character from competitors.<sup>176</sup>

This element challenges employers in two ways. First, because the analysis relies on metrics, the university should be readily identifying how, quantitatively, their mascot adds value to the business. If the character does not currently add value according to those metrics, then the university should find ways to add that needed value. Secondly, it encourages universities to utilize their characters in a 2-D fashion and generate value before launching them into the real world.

## V. APPLICATION IN OTHER PROTECTED CLASSES

This Article primarily focuses on gender discrimination within mascot hiring. This protected class likely faces the most discrimination within the mascot industry due to body shape and height requirements.<sup>177</sup> However, for universities to form effective hiring criteria that adequately protects their marks, it is important to also acknowledge how other Title VII protected classes might dull the distinctness of a character. This Section

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173. For example, Auburn University could maintain social media analytics since Aubie “reach[es] over 250,000 followers on Auburn Football’s Instagram account alone and even more viewers on accounts such as the PGATour.” *Id.*

174. See Rowe, *supra* note 44, at 59.

175. See generally Kelvin King, *The Value of Intellectual Property, Intangible Assets and Goodwill*, WORLD INTELL. PROP. ORG., [<https://perma.cc/M8TA-YHV3>] (last visited Oct. 27, 2019).

176. See ARDEN, *supra* note 69, at 76.

177. For example, University of Kansas maintains height requirements of 4’11” to 5’1” for Baby Jay and 6’1” to 6’5” for Big Jay. See Ratzlaff, *supra* note 108.

will explore, albeit in less detail, a couple additional classes that might readily affect the look of a character.

### A. Pregnancy

Pregnancy discrimination falls under Title VII's prohibition against sex discrimination.<sup>178</sup> An employer cannot dismiss an employee from work until her pregnancy becomes a significant impediment to her duties.<sup>179</sup> Within the context of mascots, pregnancy could limit the person's ability to distinctly portray the character. As the mother moves farther into her term, the character will likewise begin to take a pregnant form. This impacts not only the body shape of the character, weakening the intellectual property protections, but also the story of the character.<sup>180</sup> A university has a strong interest in maintaining both aspects of its mascot. In contrast to other types of employment, a university could not grant adequate pregnancy leave as the duration of employment is generally limited to nine months. In addition, it could not provide alternative employment because there are not typically other available mascot jobs.<sup>181</sup> Therefore, the framework described above might be invoked as a defense for discriminating against an employee who becomes pregnant during the course of her mascot career.

### B. Race

Not all mascots are covered from head to toe in fur.<sup>182</sup> For those university mascots who elect to show their more "human"

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178. See 29 C.F.R. § 1604.10 (1979).

179. See LINDEMANN 5TH, *supra* note 101, at 10-62; see also Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (noting that a plaintiff must be similarly situated in their ability to work as to a non-pregnant employee).

180. This would be equivalent to fans exclaiming that this isn't the real mascot or asking whether the mascot is well. See Ratzlaff, *supra* note 108. Additionally, this would likely raise questions from children about exactly how the mascot became pregnant and where the baby went after birth. This situation is complicated even more by a mascot's inability to verbally communicate.

181. Most universities only have one character, and if they do have another, that character likely does not fit the body shape of an employee who is pregnant. See *supra* note 157.

182. See, e.g., *Then & Now: Purdue Pete*, PURDUE U. (Feb. 22, 2019), [<https://perma.cc/LQM7-Y69J>]; *Notre Dame Introduces Diverse Leprechaun Class for 2019-20*, U. NOTRE DAME (Apr. 16, 2019), [<https://perma.cc/N4MJ-LK58>]; Chris Ross, *K-*

side, the student's race might affect the distinctness of the trademarked character. Title VII clearly prohibits any discriminatory employment action on the basis of race.<sup>183</sup> Uniquely, Title VII does not mention race when addressing the BFOQ defense.<sup>184</sup> Courts have interpreted this absence to mean that the BFOQ defense cannot justify racial employment discrimination,<sup>185</sup> however, the possibility remains for the employer to use the business necessity defense to justify a facially neutral policy.<sup>186</sup>

In the context of mascots, the business necessity would be the intellectual property of the character. Intellectual property rights have prevailed in contexts outside employment law even when the mark is associated with racially offensive material.<sup>187</sup> The courts have justified this bolstered support of intellectual property through the additional protections of the First Amendment.<sup>188</sup> Offensive mascots aside,<sup>189</sup> it is at least plausible that a university could utilize the framework above and the First Amendment to maintain strict hiring criteria to protect its characters from outside competition.

### C. Potential Modifications

While a university could utilize the framework created by Professor Rowe and described in this Article, the court should also consider other factors when making its determination. First, the court should examine the actual components of the intellectual

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*State's Newly Unveiled Willie the Wildcat Statue Is Super Creepy*, LANDGRANT GAUNTLET (Apr. 6, 2017), [<https://perma.cc/XPC2-768X>].

183. 42 U.S.C. § 2000e-2 (1991).

184. 42 U.S.C. § 2000e-2.

185. See LINDEMANN 5TH, *supra* note 101, at 6-16; see also *Ferrill v. Parker Grp.*, 168 F.3d 468, 473 (11th Cir. 1999); *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010).

186. See LINDEMANN 5TH, *supra* note 101, at 6-16; see also *Ferrill*, 168 F.3d at 474.

187. See *Matal v. Tam*, 137 S. Ct. 1744, 1764-65 (2017) (holding that the U.S. Patent and Trademark Office could not refuse to register the racially offensive trademark "The Slants" because the "disparagement clause" of the Lanham Act was drawn too broadly to satisfy the First Amendment tests).

188. *Id.*

189. See, e.g., Michael Rosen, *Here Are All the Racist College Mascots Left in the United States*, SPLINTER (Dec. 1, 2015), [<https://perma.cc/7GXF-Z5DR>] (pointing to mascots such as University of Nevada, Las Vegas's Hey Rcb! and San Diego State's Aztec Warrior).

property of the mascot. For example, race should never be a factor in mascot hiring when the character is completely covered by the suit. Second, even when the mascot suit does not cover the student from head to toe, the court should balance the four preceding elements<sup>190</sup> against the relative scrutiny of the protected class. In particular, the court should require an even greater showing of business success and necessity of the intellectual property when faced with a policy that disparately impacts a race class, rather than a gender class. These two steps would at least begin to address the uncomfortable tension between a university's valuable intellectual property and the different protected classes.

## VI. CONCLUSION

This Article does not advocate for employment discrimination. However, it does recognize that selective mascot hiring rests within a murky penumbra of employment discrimination law and intellectual property law. Employers and universities would benefit from bringing diverse characters to their organizations.<sup>191</sup> As these characters come alive, it would behoove universities to have mascots with which "people are able to identify themselves" so that they may "ring true to the audience."<sup>192</sup> But for this to occur, mascots must be unique and distinguishable. If the courts allowed employment rights to take precedence, mascots would be forced into an amorphous, indistinct existence, unprotectable by intellectual property law.

Mascots are a part of our everyday lives. They make their way onto our screens, products, and universities. Some of these characters have become so distinct that they have taken on a life of their own, far beyond the hopes and dreams of their creators. Effectively, these mascots are very much alive. The power of personification makes mascots extremely valuable to universities. As such, universities need a way to enforce strict, selective hiring

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190. See *supra* notes 138-41 and accompanying text.

191. For example, Notre Dame should be applauded for diversifying their Leprechauns, but the University may have a difficult time if it wants to enforce intellectual property rights over the character. U. NOTRE DAME, *supra* note 182. However, Notre Dame's situation may be salvageable as it is more analogous to Professor Rowe's article regarding branded service and employee outfits. See generally Rowe, *supra* note 44.

192. KLEIN, *supra* note 1.

criteria to maintain the distinctness of their characters and protect them from outside competitors. While intellectual property provides ample protection in many cases, the traditional employment discrimination framework remains an area where these protections do not cohesively fit. The result in this niche setting is less than adequate protection for such valuable assets. The solution is a new framework that adequately weighs a mascot owner's interests in the lifelike characters against those of employees that bring mascots to life.